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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

FEB 26 2009

UIL No. 9100.00-00; 408A.00-00

Legend:

Taxpayer A =

Custodian M =

Amount A =

Year 1 =

Year 2 =

IRA X =

IRA Y =

SE:EP:RA:T.4

Dear:

This is in response to your letter dated July 16, 2008, supplemented by correspondence dated December 16, 2008, submitted on your behalf by your authorized representative, in which you request relief under section 301.9100-3 of the Procedure and Administrative Regulations (the "Regulations"). The following facts and representations have been submitted under penalty of perjury in support of the ruling requested.

Taxpayer A owned IRA X, a traditional IRA described in section 408 of the Internal Revenue Code (the "Code"), and maintained by Custodian M. On September 2 of Year 1, Custodian M, at Taxpayer A's request, transferred Amount A from IRA X to IRA Y, a Roth IRA described in section 408A of the Code, as a Roth IRA conversion. IRA Y is also maintained by Custodian M.

Taxpayer A represents that at the time of the conversion, he believed that his modified adjusted gross income ("MAGI") for Year 1 would not exceed the MAGI limit for conversions under section 408A(c)(3)(B) of the Code. However, in December of Year 1, several of his mutual fund investments issued substantial capital gain distributions. Due to these unforeseen distributions Taxpayer A's MAGI exceeded the allowable annual statutory limit, and he became ineligible for the conversion.

Taxpayer A represents further that upon learning of his ineligibility to convert IRA X to Roth IRA Y, he immediately instructed Custodian M to convert Roth IRA Y back to traditional IRA X. He did not report the conversion on his Form 1040, U.S. Individual Income Tax Return, for tax Year 1, and never made any further contributions or withdrawals from IRA Y. In Year 2, while consolidating his investment and retirement accounts, Taxpayer A discovered that Custodian M had not recharacterized Roth IRA Y as a traditional IRA as he had instructed. Until that time, Taxpayer A was unaware that Custodian M had not made the conversion he had requested.

Taxpayer A's request for relief under section 301.9100 of the Regulations was filed shortly after discovering that Roth IRA Y had not been recharacterized as a traditional IRA, and prior to the Internal Revenue Service (the "Service") discovering that Taxpayer A had not timely elected to recharacterize Roth IRA Y to a traditional IRA. The statute of limitations on Taxpayer A's Federal Income Tax Return for Year 1 is closed.

Based on the foregoing facts and representations, you have requested a ruling pursuant to section 301.9100-3 of the Regulations, that the Service grant you a period of 60 days from the date of issuance of this ruling to make the election under section 1.408A-5 of the Income Tax Regulations (the "I.T. Regulations") to recharacterize Amount A as a contribution back to a traditional IRA. You have also requested that the ruling be applied retroactively to Year 1 so that no excise tax under section 4973 of the Code will apply.

With respect to your request for relief under section 301.9100-3 of the Regulations, section 408A(d)(6) of the Code and section 1.408A-5 of the I.T. Regulations provide that, except as otherwise provided by the Secretary, a taxpayer may elect to recharacterize an IRA contribution made to one type of IRA as having been made to another type of IRA by making a trustee-to-trustee transfer of the IRA contribution, plus earnings, to the other type of IRA. In a recharacterization, the IRA contribution is treated as having been made to the transferee IRA and not the transferor IRA. Under section 408A(d)(6) of the Code and section 1.408A-5 of the I.T. Regulations, this recharacterization election generally must occur on or before the date prescribed by law, including extensions, for filing the taxpayer's Federal Income Tax Return for the year of contribution.

Section 1.408A-5, Q&A-6, of the I.T. Regulations describes how a taxpayer makes the election to recharacterize the IRA contribution. To recharacterize an amount that has been converted from a traditional IRA to a Roth IRA: (1) the taxpayer must notify the Roth IRA trustee of the taxpayer's intent to recharacterize the amount, (2) the taxpayer must provide the trustee (and the transferee trustee, if different from the transferor trustee) with specified information that is sufficient to effect the recharacterization, and (3) the trustee must make the transfer.

Section 408A(c)(3) of the Code and section 1.408A-4, Q&A-2 of the I.T. Regulations provide, in relevant part, that an individual with adjusted gross income in excess of \$100,000 for a taxable year is not permitted to make a qualified rollover contribution to a Roth IRA from an individual retirement plan other than a Roth IRA during that taxable year.

Section 408A(d)(3)(C) provides that a conversion of a traditional IRA to a Roth IRA is treated as a rollover from the traditional IRA to the Roth IRA.

Section 4973(a) of the Code imposes a 6 percent excise tax on excess contributions to an IRA including a Roth IRA.

Section 4973(f) of the Code defines excess contributions with respect to a Roth IRA as the sum of (1) the excess (if any) of the amount contributed for the taxable year to the Roth IRA over the amount allowable as a contribution under section 408A(c)(2) and (c)(3), and (2) the amount of excess contributions determined for the preceding taxable year reduced by the sum of any distributions out of the account for the taxable year plus the excess (if any) of the maximum amount allowable as a contribution under section 408A(c)(2) and (c)(3) for the taxable year over the amount contributed by the individual to all individual retirement plans for the taxable year.

Sections 301.9100-1, 301.9100-2, and 301.9100-3 of the Regulations, in general, provide guidance concerning requests for relief submitted to the Service on or after December 31, 1997. Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in his discretion, may grant a reasonable extension of the time fixed by a regulation, a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin for the making of an election or application for relief in respect of tax under, among others, Subtitle A of the Code.

Section 301.9100-2 of the Regulations lists certain elections for which automatic extensions of time to file are granted. Section 301.9100-3 generally provides guidance with respect to the granting of relief with respect to those elections not referenced in section 301.9100-2. The relief requested in this case is not referenced in section 301.9100-2.

Section 301.9100-3 of the Regulations provides that applications for relief that fall within section 301.9100-3 will be granted when the taxpayer provides sufficient evidence (including affidavits described in section 301.9100-3(e)(2)) to establish that (1) the taxpayer acted reasonably and in good faith, and (2) granting relief would not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the Regulations provides that a taxpayer will be deemed to have acted reasonably and in good faith (i) if its request for section 301.9100-1 relief is filed before the failure to make a timely election is discovered by the Service; (ii) if the taxpayer inadvertently failed to make the election because of intervening events beyond the taxpayer's control; (iii) if the taxpayer failed to make the

election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (iv) the taxpayer reasonably relied upon the written advice of the Service; or (v) the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(c)(1)(ii) of the Regulations provides that ordinarily the interests of the Government will be treated as prejudiced and that ordinarily the Service will not grant relief when tax years that would have been affected by the election had it been timely made are closed by the statute of limitations before the taxpayer's receipt of a ruling granting relief under this section.

The information presented and documentation submitted by Taxpayer A is consistent with his assertion that his failure to elect to recharacterize the Roth IRA on or before the date prescribed by law, including extensions, for filing his Federal Income Tax Return for the year of contribution, was caused by his reasonable reliance on Custodian M to recharacterize Roth IRA Y as a traditional IRA, and Custodian M's failure to recharacterize IRA Y as instructed by Taxpayer A. Taxpayer A filed this request for section 301.9100 relief shortly after discovering that Custodian M did not make the conversion, and before the Service discovered his failure to make a timely election to recharacterize the failed conversion.

Thus, based on the information and the representations submitted, Taxpayer A acted reasonably and in good faith with respect to requesting an extension of time to recharacterize Amount A as a contribution to a traditional IRA. Specifically, we conclude that Taxpayer A has met the requirements of clauses (i) and (v) of section 301.9100-3(b)(1) of the regulations.

Additionally, section 301.9100-3(c)(1)(ii) of the Regulations contemplates that the interests of the government might not be prejudiced where closed years are involved if the amount of tax the taxpayer would pay if relief were granted to make a late election would be the same as if the election were timely made. In this case, granting relief will not result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made, nor will any closed years be affected, as the taxpayer has filed its return as if the election had been timely made. Therefore, the interests of the government will not be prejudiced by granting the request for relief.

Accordingly, Taxpayer A is granted an extension of time not to exceed 60 days as measured from the date of this letter ruling to recharacterize Amount A, held in Roth IRA Y, plus earnings attributable thereto, as a contribution to a traditional IRA.

In addition, because the election to recharacterize Roth IRA Y, if made within 60 days of the date of this ruling letter, will be treated as if timely made in Year 1, Amount A will not be considered an excess contribution within the meaning of section 4973(f) of the Code for purposes of the excise tax described in section 4973 of the Code.


No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative.

If you wish to inquire about this ruling, please contact ***, I.D. No. ***, at ***. Please address all correspondence to SE:T:EP:RA:T4.

Sincerely yours,



Donzell H. Littlejohn, Manager,
Employee Plans Technical Group 4

Enclosures:

Deleted copy of this letter
Notice of Intention to Disclose, Notice 437

Cc: